No. 93-960

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES, INC., BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL, INC., INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION, SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA, INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS COMPANY; MARISOL, INC.; MOBILE OIL CORPORATION; PROCTER & GAMBLE MANUFACTURING CO.; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

Petitioners,

v.

TRANSTECH INDUSTRIES, INC.; KIN-BUC, INC.; FILCREST REALTY, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a petition for a writ of *certiorari* be granted pursuant to the collateral order doctrine based upon a partial settlement under Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f)(2), which does not provide a full release of liability or protection from claims for contribution to Petitioners.

RULE 29.1 STATEMENT

Respondent Transtech Industries, Inc., is a publicly owned company that is neither a wholly nor partially owned subsidiary of any other entity, nor does it have any subsidiaries that are not wholly owned.

Respondent Kin-Buc, Inc., is a wholly owned subsidiary of Respondent Transtech Industries, Inc., and has no subsidiaries.

Respondent Filcrest Realty, Inc., is a wholly owned subsidiary of Respondent Transtech Industries, Inc., and has no subsidiaries.

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OPINIONS BELOW

In addition to the opinions of the courts below in the instant action which were provided by Petitioners, reprinted in the appendix ("A") hereto at A28, is the unreported decision of the United States District Court for the District of New Jersey, captioned *United States v. Absolute Fire Protection Co., Inc.*, Civ. Action No. 88-2087 (D.N.J., filed October 18, 1988), providing judicial approval of the Consent Decree which Petitioners claim affords them the right to take this interlocutory appeal. Consideration of this opinion (as well as the actual Consent Decree reprinted in the appendix hereto at A1) is essential to determine the "matters addressed in the settlement," as they pertain to 42 U.S.C. § 9613(f)(2).

JURISDICTION

Respondents maintain that the jurisdictional requirements of this Court have not been satisfied. The District Court refused to certify this case for interlocutory review pursuant to 28 U.S.C. § 1292(b), finding no substantial ground for difference of opinion and holding the instant Consent Decree was "not intended to cover this contribution suit by plaintiffs." (61a).

Subsequently, Petitioners sought appellate review pursuant to the collateral order doctrine. The Third Circuit denied jurisdiction, declaring that Petitioners' appeal is not "distinct from the underlying merits of the lawsuit," and Petitioners' "contentions can be raised on direct appeal after final judgment." (17a).

STATUTES INVOLVED

Respondents concur with Petitioners that the statutes at issue are: 28 U.S.C. § 1291; and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") § 113(f)(2), 42 U.S.C. § 9613(f)(2).

STATEMENT OF THE CASE

This case involves the disposal of hazardous waste at the Kin-Buc Landfill ("Landfill" or "Site"), located in Edison, New Jersey. In 1980, the United States Environmental Protection Agency ("EPA") undertook certain environmental activities at the Landfill. Thereafter, on September 23, 1983, EPA issued an Administrative Order pursuant to 42 U.S.C. § 9606 (Docket No. II-CERCLA-30102), requiring that a number of private parties, including Respondents, take additional environmental actions. As a result of Respondents' compliance with that administrative order, EPA was able to conclude its direct activities at the Site. Respondents continue to conduct cleanup activities related to the environmental remediation at the Landfill.

A. The Action which Resulted in Petitioners' Consent Decree with the United States

In 1984, EPA sought recoupment for the costs it had incurred as a result of activities it had undertaken at the Landfill. Failing to obtain reimbursement from Respondents, EPA issued demand letters to approximately 360 parties. On May 16, 1988, the United States filed an action, captioned *United States of America v. Absolute Fire*

Protection Company, Inc., No. 88-2087, seeking these costs. Thereafter, Petitioners and EPA entered into a consent decree (the "Consent Decree") concluding that litigation. (A1).

The Consent Decree provides that the "Basic Settlement Amount" was "the total amount of all the Past Response Costs incurred by the United States and is intended to reimburse the United States for any and all such Past Response Costs." (A18-19). This payment was specifically limited as satisfaction of the United States' "Past Response Costs and Past Response Actions and for any administrative costs and civil penalties which may have accrued prior to April 30, 1987, and for interest on such sums, which may have accrued prior to September 22, 1987, with regard to the Kin-Buc Landfill." (A20).

Nothing in the Consent Decree provides Petitioners with a complete release regarding their liability for further environmental remediation of the Landfill nor for costs incurred by other private parties. Likewise, the Consent Decree does not provide any protection from third-party claims for contribution. The only provision in the Consent Decree regarding other environmental response costs states that the United States would seek future response costs it incurred, if any, from other potentially responsible parties (identified therein as the Nonsettling Parties) before going back to the Petitioners (the Settling Parties):

> [I]n the event the United States has made all reasonable efforts to recover from the Nonsettling Parties the amount of Future Response

> Costs or such other sums at the Kin-Buc Landfill, pursuant to relevant statutes and authorities, the United States may commence an administrative or judicial civil action against the Settling Parties to recover the amount of those Future Response Costs or such other sums it has been unable, after having made all reasonable efforts, to recover from Nonsettling Parties. (A22).

Pursuant to the CERCLA requirement for approval of a consent decree, the District Court Judge for the District of New Jersey, the Honorable Alfred J. Lechner, delineated the matters addressed in the settlement:

> Under the agreement, the two hundred twenty six defendants in this case agree to pay $4,980,398, which represents the response costs incurred through April 30, 1987, plus interest through September 22, 1987 ("past response costs"). The delivery of this payment will extinghish [sic] the United States' claims for past response costs against the settling parties. (A31, citation omitted).

By contrast, Judge Lechner specifically found that the Consent Decree did *not* release Petitioners from future costs incurred at the Landfill:

> According to the consent decree, the settling parties are not released from any liability with respect to any actions or costs incurred by the United States after April 30, 1987 ("future response actions" or "future response costs"). (A32, citation omitted).

Furthermore, the District Court Judge determined that the Consent Decree did *not* bar a contribution action by a private party for its independently incurred costs:

> As pointed out by the Government, the decree only requires the Government to oppose joinder when it is sought in the context of a direct enforcement action brought by the Government against a non-settling PRP [potentially responsible party]. Thus, as long as Earthline [a Non-settling Party] complies with its legal obligations and no action is brought against it by the United States, paragraph 8(c) will not apply and Earthline **may seek contributions from the settling parties** without opposition from the Government. (A40, *emphasis supplied*).

No appeal from Judge Lechner's interpretation of the Consent Decree was ever taken by any party, including Petitioners.

B. The Instant Action

On August 24, 1990, Respondents filed the instant action claiming, *inter alia*, a right to contribution from 445 defendants, including Petitioners, for the costs they incurred related to the environmental remediation of the Landfill. None of those costs pertain to those incurred by the United States which were addressed in the Consent Decree.

On April 1, 1991, Petitioners sought dismissal of Respondents' complaint, claiming that by operation of CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2), they were absolved of all further liability at the Site. That section provides:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be

> liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of others by the amount of the settlement.

42 U.S.C. § 9613(f)(2).

The District Court below, the Honorable Harold A. Ackerman, held that the Consent Decree "only covers the past response costs and past response actions incurred by the United States." (42a). Judge Ackerman determined that, in accord with the District Judge's approval of the Consent Decree, Respondents' contribution claim against Petitioners was permitted:

> Moreover, in response to a concern by a non-settling party, Judge Lechner held that "as long as (a non-settling party) complies with its legal obligations . . . [it] may seek contributions from the settling parties." *Id.* at 17. [A40] A judge approving a consent decree in a CERCLA case is mandated to take into account the equities of the situation. He or she cannot approve a consent decree that is simply unjust or unfair. Given Judge Lechner's own equitable interpretation of the decree he approved, it would be illogical for this court to hold that as a matter of law, a contrary, inequitable interpretation, governs. [39a].

On August 13, 1992, Petitioners sought reconsideration or, in the alternative, certification for interlocutory review pursuant to 28 U.S.C. § 1292(b). In a second unreported opinion, the District Court flatly rejected Petitioners' motion and refused to certify this matter for

interlocutory appeal, stating that the facts "clearly show that the Consent Decree was not intended to cover this contribution suit by plaintiffs." (61a).

Despite the District Court's refusal to certify this matter, Petitioners, nevertheless, sought appellate review, this time pursuant to the narrow exception to the final judgment rule known as the "collateral order doctrine" first delineated in the Court's decision in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The Third Circuit, however, also rejected Petitioners' attempt at appellate jurisdiction stating that it had "substantial doubts . . . that the issues raised in defense of appellate jurisdiction under the collateral order doctrine are distinct from the underlying merits of the lawsuit," and determined that "it is quite clear that the settlor-defendants' contentions can be raised on direct appeal after final judgment." (17a). Petitioners' request for mandamus was also denied by the Third Circuit for failure to assert a cognizable basis for relief.

REASONS FOR DENYING CERTIORARI

1. The Consent Decree Does Not Provide a Final Release of Liability to Petitioners and Therefore Does Not Warrant Review Under the Collateral Order Doctrine

Petitioners have provided no issue that merits review by this Court. Both decisions by the trial court below, as well as the opinion of the District Court approving the Consent Decree, are specific in holding that Petitioners did not obtain a final release for their liability related to

the Kin-Buc Landfill. Thus, unlike the case cited by Petitioners, *Digital Equipment Corp. v. Desktop Direct, Inc.*, 993 F.2d 755 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 379 (November 1, 1993), this case is distinguishable. Accordingly, even if this Court were to extend the collateral order doctrine to include settlement agreements, it would not be applicable to the petition herein.

In each case which addresses the relationship between the collateral order doctrine and a settlement agreement, the determination has centered on whether a party has the right not to go to trial by virtue of that agreement. *See Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992) (releasor's retention of benefits constituted a ratification, thereby releasing defendant from all liability); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) (ratification of release affording party right not to go to trial reviewable under collateral order doctrine); *Janneh v. GAF Corp.*, 87 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990) (enforceable settlement includes bargained-for right to avoid trial, reviewable under the collateral order doctrine); *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766 (8th Cir. 1989) (settlement between the parties provided, *inter alia*, dismissal of all litigation). In each of these cases, sustaining those settlements resulted in the dismissal of the underlying action because all liability had been resolved by the settlement itself.

Here, Respondents have shown that the Consent Decree does *not* provide Petitioners with a full release for their liability. In fact, in the Decree, the Government expressly *reserved* its right to hold Petitioners liable for future costs related to the cleanup of the Landfill:

> [I]t is the intention of the United States to retain its legal rights to seek further relief from the settling Parties as defined and limited by the provisions herein, (1) from any and all Future Response Costs, and (2) for injunctive or other relief which may be available at law or equity in connection with the Kin-Buc Landfill[.] (A17-18).

Clearly, Petitioners' attempt to link the instant matter to the *Desktop* case is misplaced for it is evident that whatever result is reached in *Desktop* it will have no bearing on the instant case. To suggest that the Consent Decree provides a final settlement of Petitioners' liability and resolves this matter is indisputably in error and over-reaching. Therefore, Respondents maintain that there is no basis, in law or in fact, for Petitioners' request for *certiorari* based on the collateral order doctrine.

2. The Consent Decree at Issue Does Not Provide Protection from Respondents' Claims for Contribution as Those Claims are Not "Matters Addressed in the Settlement"

Petitioners claim that pursuant to the Consent Decree they were afforded protection from third-party claims for contribution. However, this issue is not properly before the Court, as it was not ruled upon by the Third Circuit. Thus, even if this Court does decide that the instant matter is entitled to interlocutory review pursuant to the collateral order doctrine, Respondents maintain that this case should be remanded to the Third Circuit for a determination on the merits.

Nevertheless, this claim is clearly without merit, as shown by this brief response. First, nowhere in the Consent Decree does there appear any language affording protection from claims for contribution. As was correctly observed by the District Court below, it is the Consent Decree that determines the scope of protection provided to Petitioners, " 'A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement cannot be liable for claims for contribution regarding matters addressed *in the settlement.*' " (56a, emphasis in original).

Further, Judge Lechner, the District Court Judge approving the Consent Decree, specifically held at the time the settlement was approved that an objecting Nonsettling Party "may seek contributions from the settling parties. . . . " (A40). Thus the Judge charged with the responsibility of determining whether the Consent Decree was reasonable and fair found that the Consent Decree did *not* afford such contribution protection as now claimed by Petitioners. *Compare U.S. v. Cannon's Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990) (court must determine whether a proposed consent decree is procedurally fair, substantively fair and reasonable).

Finally, while not disclosed by Petitioners, the United States Department of Justice filed an *amicus curiae* brief with the Third Circuit *opposing* Petitioners' assertion that the Consent Decree bars Respondents' claim for contribution. The Government's position is revealing and persuasive as it was the other party to the Consent Decree and therefore has knowledge regarding the actual intent of that document.

Ultimately, Petitioners are attempting to entice the Court to grant *certiorari* on the basis of whether or not § 113(f)(2) provides "immunity" to suit. However, to reach that issue, a settlement pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2) must have addressed the issue of Respondents' claims. Unquestionably, where a consent decree does not provide for protection from those claims, no "immunity" can exist.

As further proof of Respondents' position, other decisions which Petitioners have pointed to approving settlements pursuant to 42 U.S.C. § 9613(f)(2) are clearly distinguishable from the case at bar as each explicitly refers to the grant of contribution protection. *See, e.g., Denver v. Adolph Coors Co.*, 829 F. Supp. 340 (D. Col. 1993) (decision approved settlement, barred claims for contribution and determined non-settlors' share of liability); *U.S. v. Cannon's Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (settling parties "were released outright from all liability" and "were also exempted from suits for contribution"); *U.S. v. Rohm & Haas*, 721 F. Supp. 666, 675 (D.N.J. 1989) (under consent decree's provisions, non-settling defendants barred from seeking contribution from any of the settling defendants).

Looking to the language of the instant Consent Decree, the District Court Judge approving that Decree and the interpretation given to that Decree by the Government itself, it is obvious that Petitioners were *never* afforded protection from Respondents' claim for contribution. As a result, Respondents maintain that interlocutory review is not appropriate as Respondents' claim for

contribution is not a "matter[] addressed in the settlement" as required under Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).

CONCLUSION

Based upon the foregoing, review by this Court is unnecessary and inappropriate. The Consent Decree upon which the Petition for a Writ of *Certiorari* is based provides Petitioners neither a full release of liability nor protection against Respondents' claim for contribution. Thus, unlike cases argued by Petitioners in support of their request for interlocutory review pursuant to the collateral order doctrine, the instant Consent Decree does not afford Petitioners a right not to go to trial.

For all the foregoing reasons, Respondents respectfully request that the instant Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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Dated: January 18, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. ABSOLUTE FIRE PROTECTION, CO., INC., ACCURATE FORMING DIVISION TYCO LABORATORIES, ACTIVE OIL SERVICE, ADCHEM CORP., AIR PRODUCTS AND CHEMICALS, INC., BOC GROUP, INC., f/k/a/ AIRCO, INC., ALCAN ALUMINUM CORP., ALCOLAC, INC., GOULD, INC., as successor to ITE IMPERIAL CORP., ALKON PRODUCTS DIVISION, ALLIED-SIGNAL INC., as successor to ALLIED CORP. (f/k/a/ ALLIED CHEMICAL CORP.), THE BENDIX CORP., and SINCLAIR & VALENTINE CO., INC., and on behalf of its wholly-owned subsidiaries UOP INC. and BARON BLAKESLEE, INC, PORTFOLIO ONE, INC. (f/k/a CHEMLIME CORP.), successor to ALMO ANTI-POLLUTION SERVICES CORP., ALPHA METALS INC., AMERADA HESS CORP., AMERICAN CYANAMID CO., including its wholly-owned subsidiary SHULTON, INC.,	CIVIL ACTION NO. 88-2087 (AJL) (Filed Aug. 1, 1988)

BAXTER HEALTHCARE)
CORPORATION, formerly)
TRAVENOL LABORATORIES,)
INC., successor to AMERICAN)
HOSPITAL SUPPLY CORP.,)
AMERICAN PRODUCTS)
COMPANY, INC., AMERICAN)
STANDARD INC., ASHLAND OIL,)
INC., on behalf of its ASHLAND)
CHEMICAL CO. and DREW)
CHEMICAL CORP. divisions,)
ASSOCIATED MARBLE CO.,)
ASTRO PAK CORPORATION,)
AUTOMATIC CONNECTOR INC.,)
AVANTE PRODUCTS)
CORPORATION, AXTON CROSS)
COMPANY, INC., BASF CORP., as)
successor in interest to BASF)
WYANDOTTE CORP. and the)
INMONT CORP., and on behalf of)
its wholly-owned subsidiaries)
FRITSCHE, DODGE AND OLCOTT)
and KNOLL PHARMACEUTICALS,)
THE BATES MANUFACTURING)
CO., BEACON FAST FREIGHT)
CO., INC., BECTON, DICKINSON)
AND COMPANY, BIDDLE)
SAWYER CORP., BENJAMIN)
MOORE & CO., BIOCRAFT)
LABORATORIES, INC., BORDEN,)
INC., BORG-WARNER)
CHEMICALS, INC., BOROUGH OF)
WALLINGTON, UNISYS CORP.)
(formerly BURROUGHS CORP.,)
and successor to SPERRY CORP.),)

CPC INTERNATIONAL, INC.,)
including its division BEST FOODS)
and its wholly-owned subsidiary)
PENICK CORP., successor to S.B.)
PENICK AND CO., CARBOLINE)
CO., on behalf of TOCH)
BROTHERS, INC., CARPENTER)
TECHNOLOGY CORPORATION,)
HOECHST CELANESE CORP., on)
behalf of its divisions, CELANESE)
COATINGS CO. and CELANESE)
RESEARCH CORP., CHEMICAL)
LEAMAN TANK LINES INC.)
(including VANGUARD)
TRANSPORTATION, both)
subsidiaries of CHEMICAL)
LEAMAN CORP.), CIBA-GEIGY)
CORP. (including TOMS RIVER)
CHEMICAL CORP.), CLAIROL)
INC., COCA-COLA FOODS, a)
division of THE COCA-COLA CO.,)
COLGATE-PALMOLIVE CO., CON-)
LUX COATINGS, INC.,)
CONTINENTAL CAN CO., INC.,)
ICI AMERICAS INC. (successor to)
CONVERTERS INK CO.), JOHN H.)
COONEY, INC., a/k/a COONEY)
CONSTRUCTION, COVINO'S)
INDUSTRIAL DISPOSAL SERVICE,)
INC., CRANE & CO., INC.,)
CURTISS-WRIGHT CORP.,)
DARWORTH CO., DIVISION OF)
ENSIGN-BICKFORD INDUSTRIES,)
INC., DATA GENERAL CORP.,)

DELEET MERCHANDISING)
CORP., OCCIDENTAL CHEMICAL)
CORP., as successor to)
OCCIDENTAL)
ELECTROCHEMICALS CORP. (f/)
k/a DIAMOND SHAMROCK)
CHEMICALS CO.), THE DOW)
CHEMICAL CO., including DOW)
INDUSTRIAL SERVICES, DUBOIS)
CHEMICALS, INC., E.I. DUPONT)
DE NEMOURS AND CO., INC.)
(including CONOCO, INC.,)
CONTINENTAL OIL,)
CONTINENTAL CHEMICAL CO.,)
and DUPONT-TAU)
LABORATORIES), DURO-TEST)
CORP., E.R. SQUIBB & SONS,)
INC., BAROUH EATON ALLEN)
CORP., EDAL INDUSTRIES, INC.,)
BROWNING-FERRIS INDUSTRIES)
OF ELIZABETH, NEW JERSEY,)
INC., NIAGARA SANITATION)
COMPANY, INC., as successor to)
RAPID DISPOSAL SERVICE, INC.,)
CECOS INTERNATIONAL, INC.,)
ELMWOOD TANK & PIPING)
CORP., ECUADORIAN LINE, INC.,)
EXXON CORP., FMC CORP.,)
FETTE FORD, INC., HEXCEL)
CORP. (as successor to FINE)
ORGANICS), OCCIDENTAL)
CHEMICAL CORP., as successor to)
FIRESTONE PLASTICS, FISHER)
SCIENTIFIC CO., FLUID)
PACKAGING CO., INC. (formerly)
FLUID CHEMICAL CO., INC.),)
FORD MOTOR CO.,)

FYN PAINT & LACQUER CO.,)
GAF CORP., SYBRON)
TRANSITION CORP. and SYBRON)
CHEMICALS INC. (one or both)
having done business as GAMLEN)
CHEMICAL CO.), GANES)
CHEMICALS, INC. (including its)
wholly-owned subsidiary)
SIGFRIED CHEMICALS), GATX)
TERMINALS CORP., GENERAL)
ELECTRIC CO., GENERAL)
MOTORS CORP. (including its)
DELCO REMY DIVISION),)
GOODALL RUBBER CO., THE)
GOODYEAR TIRE & RUBBER CO.,)
GUARD ALL CHEMICAL CO.,)
INC., CHEVRON U.S.A. INC. (on)
behalf of GULF OIL CORP.),)
CHEMICAL CHEMICAL CO. (on)
behalf of KEWANEE INDUSTRIES,)
INC. and its former divisions)
BERKELEY CHEMICAL and)
MILLMASTER CHEMICAL), H & S)
CHEMICAL CO., HATCO)
CHEMICAL DIVISION, HATFIELD)
WIRE & CABLE DIVISION OF)
CCX, INC., HERCULES, INC.)
(including its wholly-owned)
subsidiary HAVEG INDUSTRIES,)
INC.), HI-PURE CHEMICALS,)
INC., HOFFMAN-LA ROCHE)
INC., HYDROCARBON)
RESEARCH, INC., IBM CORP.,)
INTERNATIONAL FLAVORS AND)
FRAGRANCES, INC., ITT)
CORPORATION (including its ITT)
AVIONICS and DEFENSE)
COMMUNICATIONS divisions),)
ILFORD PHOTO CORP.,)

f/k/a ILFORD INC., SAFETY-KLEEN ENVIROSYSTEMS CO. (on behalf of INLAND CHEMICAL CORP. and McKESSON CORPORATION), INTERDATA CORP., J.M. HUBER CORP., J.T. BAKER, INC. (formerly J.T. BAKER CHEMICAL CO.), JAMES P. HORAN, INC., JOHN DUSENBERRY CO., INC., JOHNSON & JOHNSON (on behalf of its wholly-owned subsidiaries PERSONAL PRODUCTS COMPANY, ORTHO DIAGNOSTIC SYSTEMS, INC., and ORTHO PHARMACEUTICAL CORPORATION), STROH CONTAINER CO. (successor to JOS. SCHLITZ BREWING CO.), LUCAS INDUSTRIES INC., (successor to JOSEPH LUCAS NORTH AMERICA, INC.), KTK CORP., KAY-FRIES, INC., KEUFFEL & ESSER CO., KOPPERS CO., INC., L.E. CARPENTER & CO., THE LAWRENCE McFADDEN CO., LAWSON PRODUCTS, INC., LEHIGHTON ELECTRONICS, INC., LEVER BROTHERS CO., and on behalf of its affiliate CHESEBOROUGH-PONDS, INC., LCP CHEMICALS AND PLASTICS, INC. (formerly LINDEN CHLORINE PRODUCTS), LINDEN MOTOR FREIGHT CO., INC., M & T CHEMICALS, INC.,

MASS [sic] & WALDSTEIN,)
MALLINCKRODT INC., MANNON)
EXCAVATING AND PAVING CO.,)
INC., MARISOL, INC., THE)
NUTRASWEET CO. (successor to)
MATHESON GAS PRODUCTS,)
INC.), JOHN MATTHEY, INC.)
(successor to MATTHEY BISHOP,)
INC.), MAYCO OIL & CHEMICAL,)
THE MEARL CORPORATION,)
MERCK & CO., INC., METRO OIL)
& CHEMICAL CORP., MOBIL OIL)
CORPORATION (including its)
division MOBIL CHEMICAL CO.),)
SPECTRASERV, INC. (f/k/a)
MODERN TRANSPORTATION)
CO.), MONMOUTH MEDICAL)
CENTER, MONSANTO COMPANY,)
MORTON THIOKOL, INC. (on)
behalf of its divisions MORTON)
CHEMICAL CO., VENTRON)
CORP., and THIOKOL CHEMICAL)
CO.), NL INDUSTRIES, INC.,)
GENERAL CERAMICS, INC. (f/)
k/a NATIONAL BERYLLIA)
CORP.), NATIONAL GYPSUM CO.,)
NATIONAL STARCH AND)
CHEMICAL CORP., HIGH)
VOLTAGE ENGINEERING CORP.)
(successor to NATVAR CORP.),)
NEPARA, INC., SAB NIFE, INC.,)
f/k/a NIFE, INC., ADRON, INC.)
(f/k/a NORDA, INC., and on)
behalf of its wholly-owned)
subsidiary ORBIS PRODUCTS)
CORP.), NORTON & SON, INC.,)

OAKITE PRODUCTS, INC. (on behalf of its division OAKLEY SERVICE CO.), THE OKONITE CO., OLIN CORP. (including OLIN CHEMICAL CORP. and PHILLIP A. HUNT CHEMICAL) and on behalf of WINCHESTER REPEATING ARMS (f/k/a WINCHESTER WESTERN), PAQUET ONEIDA, INC. (as successor to ONEIDA PACKAGING), ORGANON, INC., THE ORMOND SHOPS, INC., PVO INTERNATIONAL, INC., PUBLIC SERVICE ELECTRIC AND GAS CO., PQ CORPORATION (f/k/a PHILADELPHIA QUARTZ), PAMARCO INC., THE PENN CENTRAL CORP. (including its subsidiary GENERAL CABLE CO.), PERK CHEMICAL CO., INC., PFIZER INC. (f/k/a CHARLES PFIZER, INC.), and including its division HOWMEDICA, PHELPS DODGE CORP., PITNEY BOWES INC., POLAROID CORPORATION, POLYMER MATERIALS, INC. (including POLYMER, INC.), UNITED TECHNOLOGIES CORP., PRATT & WHITNEY GROUP, PRINCETON NURSERIES, PROCEDYNE CORP., THE PROCTOR & GAMBLE MANUFACTURING CO., QUAKER CHEMICAL CORP., R.W. EAKEN, INC., RADIAC RESEARCH CORP.,

REAGENT CHEMICAL &)
RESEARCH, THE GREYHOUND)
CORP. (for REHEIS CHEMICAL)
CO.), REICHHOLD CHEMICALS,)
INC., REVERE COPPER & BRASS,)
INC., REYNOLDS METALS CO.,)
RHEEM MANUFACTURING CO.,)
RIVERVIEW HOSPITAL, ROLLINS)
ENVIRONMENTAL SERVICES)
(N.J.), INC., RUSSELL REID CO.,)
RUSSELL-STANLEY CORP.,)
RUTGERS-THE STATE)
UNIVERSITY, RYCOLINE)
PRODUCTS, INC., SANDOZ)
CHEMICALS CORP. (successor to)
COLORS AND CHEMICALS)
DIVISION OF SANDOZ, INC.),)
LEKSI, INC. (f/k/a SARTOMER)
INDUSTRIES, INC.), SCHERING)
CORP., SCOTT PAPER COMPANY,)
SEALED AIR CORP., SEN-DURE)
PRODUCTS INC., SETON HALL)
UNIVERSITY, SHELL CHEMICAL)
CO., SIKA CORP., SMITHKLINE)
BECKMAN CORPORATION,)
SOLVENTS RECOVERY SERVICE)
OF NEW JERSEY, INC.,)
SOUTHERN CALIFORNIA)
CHEMICAL CO., INC., SAINT)
BARNABAS MEDICAL CTR., A.E.)
STALEY MANUFACTURING CO.,)
on behalf of its STALEY)
CHEMICAL DIVISION,)
STANDARD TOOL &)
MANUFACTURING CO.,)

THE STANLEY WORKS (as successor to STANLEY-WETTY INC.), STAUFFER MANAGEMENT CO., successor to STAUFFER CHEMICAL CO., STEPAN COMPANY, SEQUA CORP. (formerly SUN CHEMICAL CO.), TENNECO RESINS, INC., TEXACO, INC., TEXACO BUTADIENE CO., formerly TEXAS-U.S. CHEMICAL CO., TEXTRON, INC., on behalf of its former SPENCER-KELLOGG and BOSTITCH DIVISIONS, UNITED STATES METALS REFINING COMPANY, SAFETY LIGHT CORP. (f/k/a U.S. RADIUM), US SAMICA CORP., UNION CARBIDE CORP., UNIROYAL CHEMICAL CO., INC. (as successor to THE CHEMICAL BUSINESS OF UNIROYAL, INC.), THE UPJOHN CO., VINELAND CHEMICAL CO., INC., ARCO PETROLEUM PRODUCTS (on behalf of WILLIAM C. PULLEN, INC.), COOPER INDUSTRIES, INC. (on behalf of its subsidiary WAGNER ELECTRIC CORP.), WALL TRENDS, INC., WALTER KIDDE, DIVISION OF KIDDE, INC., AT&T TECHNOLOGIES, INC. (formerly WESTERN ELECTRIC CO., INC.), WESTERN UNION,

WESTINGHOUSE ELECTRIC)
CORP., WHITE CHEMICAL CORP.,)
WITCO CHEMICAL CORP., Z & W)
ENTERPRISES, INC., ATI, INC., on)
behalf of CHEMSPRAY, ASARCO,)
INCORPORATED (f/k/a AMERI-)
CAN SMELTING AND REFINING)
CO., including its wholly-owned)
subsidiary FEDERATED METALS)
CORP.), RCA CORP., AKZO CHEMI-)
CALS INC., on behalf of its division)
INTERSTAB CHEMICALS (formerly)
INTERSTAB CHEMICALS, INC.),)
ECOLAB INC., successor to APO-)
LLO TECHNOLOGIES, INC. (f/k/a)
APOLLO CHEMICAL CO.), IMPE-)
RIAL OIL COMPANY, INC., W.W.)
ANDRESS COMPANY, GULTON)
INDUSTRIES, INC., as successor to)
GULTON BATTERY CORP.,)
)
Defendants)
)
)
)
)

CONSENT DECREE

WHEREAS, the United States of America ("United States"), at the request of the Administrator of the United States Environmental Protection Agency ("Administrator"), on May 16, 1988 filed a complaint in this matter pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, as Public Law No. 99-499, 100 Stat. 1613, ("CERCLA") for the recovery of all response costs that have been incurred

by the United States in response to alleged releases and threatened releases of hazardous substances from the Kin-Buc Ladfill [sic], located at 383 Meadow Road in Edison, New Jersey; and

WHEREAS, the Administrator issued Findings of Fact, Determination and Order on September 3, 1983 under authority of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), styled "IN THE MATTER OF SCIENTIFIC, INC., KIN-BUC, INC., WASTEQUID, INC., INMAR ASSOCIATES, INC., FILCREST REALTY, INC., MARVIN MAHAN, ROBERT MEAGER [sic], SCA SERVICES, INC., SCA SERVICES OF PASSAIC, INC., ANTHONY GAESS, and EARTHLINE COMPANY, Respondents." Docket No.: II-CERCLA-30102 and the Administrator issued further Findings of Fact, Determination, and Amended Order on March 25, 1986, also under authority of Section 106(a) of CERCLA, styled "IN THE MATTER OF KIN-BUC LANDFILL, EDISON, NEW JERSEY: ANTHONY GAESS, MARVIN MAHAN, and ROBERT MEAGHER, individuals, EARTHLINE COMPANY, a partnership, and CHEMICAL WASTE MANAGEMENT, INC., FILCREST REALTY, INC., INMAR ASSOCIATES, INC., KIN-BUC, INC., SCA SERVICES, INC., SCA SERVICES OF PASSAIC, INC., SCIENTIFIC, INC., and WASTEQUID, INC., corporations Respondents." Docket No.: II-CERCLA-60105 (hereinafter the "Kin-Buc 106 Orders"); and

WHEREAS, the Kin-Buc 106 Orders require the above named captioned respondents (herein the "Owners/Operators") to take certain actions as specified therein directed to the abatement of the release and threat of release into the environment of hazardous substances at the said Kin-Buc Landfill and related facilities, as defined

in the Kin-Buc 106 Orders (herein collectively the "Kin-Buc Landfill"); and

WHEREAS, the Kin-Buc 106 Orders, being the only Administrative Orders issued by the Administrator in effect with regard to the Kin-Buc Landfill as of the date of this Consent Decree, remain in effect as of the date of this Consent Decree against all of the Owners/Operators and are not in effect as to any Defendant; and

WHEREAS, the United States intends and expects that the Kin-Buc 106 Orders shall remain in full force and effect against the Owners/Operators and that said Orders shall result in the abatement of release and threat of release into the environment of hazardous substances at the Kin-Buc Landfill; and

WHEREAS, the President, through authority granted to the Administrator deriving from CERCLA, the Clean Water Act, and the Solid Waste Disposal Act, has from time to time, prior to April 30, 1987, taken action in addition to the issuance of the Kin-Buc 106 Orders to respond to and arrange for response actions relating to, the release and threat of release of hazardous substances at the Kin-Buc Landfill (herein the "Past Response Actions"); and

WHEREAS, the United States contends that all Past Response Actions have not been inconsistent with the National Contingency Plan; and

WHEREAS, the United States contends that Past Response Actions have resulted in the incurrence of costs through April 30, 1987, and interest on such costs through September 22, 1987, by the United States totaling

$4,980,398 (FOUR MILLION, NINE HUNDRED AND EIGHTY THOUSAND, THREE HUNDRED AND NINETY-EIGHT DOLLARS, herein the "Past Response Costs"); and

WHEREAS, as used herein, the terms "Past Response Costs," and "Past Response Actions" shall not be construed to include any claims for damages for injury to, destruction of, or loss of natural resources, whenever such claims arose, or any related enforcement costs; and

WHEREAS, the United States expects, from time to time after April 30, 1987, to take actions to further respond to, and arrange for or compel response to, the alleged release and threat of release of hazardous substances at the Kin-Buc Landfill, including, if necessary, actions to abate imminent and substantial endangerments to prevent threats to public health, welfare or the environment, to ameliorate environmental harm, or to seek damages for injury to, destruction of, or loss of natural resources in connection with the Kin-Buc Landfill (herein "Future Response Actions") and, in so doing, to cause the United States to incur further costs (herein "Future Response Costs"); and

WHEREAS, the United States contends that certain persons and entities, including the Defendants hereto, by reason of their arrangement for disposal or treatment, or by reason of their transport, or arrangement for transport for disposal or treatment of the hazardous substances at the Kin-Buc Landfill, are responsible parties pursuant to § 107(a) of CERCLA, 42 U.S.C. § 9607(a), (hereinafter "Potentially Responsible Parties") and are, together with

the Owners/Operators, jointly and severally responsible for the Past Response Costs; and

WHEREAS, the Administrator has made ~~a dem~~and of the Owners/Operators and also of certain Potentially Responsible Parties, including the Defendants, to reimburse the United States for the Past Response Costs; and

WHEREAS, some, but not all of the Potentially Responsible Parties, and none of the Owner/Operators, have responded to the Administrator's demand for reimbursement (hereinafter those Potentially Responsible Parties that have agreed to enter into this Consent Decree to settle the claims of the United States for reimbursement of Past Response Costs are referred to as "Settling Parties" and hereinafter the Owners/Operators, together with those Potentially Responsible Parties that have not agreed to enter into this Consent Decree, are referred to as "Nonsettling Parties"); and

WHEREAS, the Settling Parties deny any and all responsibility or liability of any kind whatsoever under any statute or common law for any release or threat of release of hazardous materials at the Kin-Buc Landfill; and

WHEREAS, the Settling Parties have agreed, pursuant to the terms of this Consent Decree, to pay the Past Response Costs, and the United States is agreeable to their so doing in full satisfaction of all claims of the United States with regard to Past Response Costs and Past Response Actions; and

WHEREAS, in entering into this consent Decree, the United States has considered the circumstances of the

releases and threatened releases of hazardous substances at the Kin-Buc Landfill and the involvement of various persons and entities in the ownership and operation of the Kin-Buc Landfill and the arrangement and transportation for disposal of hazardous substances at the Kin-Buc Landfill, and has considered the willingness and capacity of various parties to resolve this matter and is entering into this Consent Decree in the exercise of its prosecutorial discretion; and

WHEREAS, the United States, in consideration of payments of the Settling Parties as set forth herein, desires (a) to release and discharge any claim for any and all Past Response Costs and Past Response Actions against the Settling Parties and (b) to covenant to limit civil suit and administrative process against the Settling Parties for any Future Response Actions and any Future Response Costs which may be incurred by the United States in connection with the Kin-Buc Landfill, including any civil action or suit for affirmative or injunctive relief, or any other civil relief which may hereafter be available to the United States at law or equity, in connection with the Kin-Buc Landfill, but not in such a manner as to release any Settling party for Future Response Actions, Future Response Costs or to impair, except as expressly set forth herein, any claim for affirmative or injunctive relief, or any other relief which may hereafter be available to the United States at law or equity, in connection with the Kin-Buc Landfill; and

WHEREAS, except for the particular claims extinguished by payment pursuant to this Consent Decree, it is not the intention of the parties to this Consent Decree to settle any claim, release any persons or entities, or

covenant not to sue or covenant not to issue administrative process against any Nonsettling Party or any other person or entity not a party to this Consent Decree; and

WHEREAS, in recognition of the consideration provided hereunder by the Settling Parties, to the extent the United States deems it necessary to seek with regard to the Kin-Buc Landfill from any person or entity any civil relief in addition to the reimbursement of Past Response Costs provided for in this Consent Decree, including affirmative or injunctive relief or any other civil relief available to the United States at law or equity, it is the purpose of the covenant to limit suit contained in this Consent Decree that the United States shall seek such relief initially from Nonsettling Parties and shall be permitted to seek such relief from Settling Parties only in the event that the United States shall fail in its efforts to obtain such relief fron Nonsettling Parties pursuant to the terms spelled out in this Consent Decree; and

WHEREAS, in the event that the United States should fail to obtain from Nonsettling Parties their voluntary conduct of all Future Response Actions and their voluntary payment of all Future Response Costs, it is the present expectation of the parties to this Consent Decree that the United States shall use all reasonable efforts to compel the conduct of such Future Response Actions and obtain the payment of such Future Response Costs through litigation against Nonsettling Parties; and

WHEREAS, it is the intention of the United States to retain its legal rights to seek further relief from the Settling Parties as defined and limited by the provisions herein, (1) for any and all Future Response Costs, and (2)

for injunctive or other relief which may be available at law or equity in connection with the Kin-Buc Landfill; and

WHEREAS, the United States and the Settling Parties have each stipulated and agreed to the making and entry of this Consent Decree prior to the taking of any testimony, based upon the pleadings herein, and without any admission of liability or fault as to any allegation or matter arising out of the pleadings by any party; and

WHEREAS, the United States and the Settling Parties agree that settlement of this matter and entry of this Consent Decree is made in good faith in an effort to avoid further expensive and protracted litigation, without any admission as to liability for any purpose; and

WHEREAS, each undersigned representative of the parties to the Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such party to this document.

NOW THEREFORE it is ORDERED, ADJUDGED AND DECREED as follows:

1. *JURISDICTION.* The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1345, 42 U.S.C. § 9613 and has jurisdiction over to the parties to this Consent Decree. The Settling Parties waive any objection they may have to the jurisdiction of the Court.

2. *THE BASIC SETTLEMENT AMOUNT.* The Settling Parties agree to make and the United States has agreed to accept a payment to the United States in the

amount of $4,980,398.00 which amount is the total amount of all the Past Response Costs incurred by the United States and is intended to reimburse the United States for any and all such Past Response Costs.

3. *TRUST ACCOUNT.* The Settling Parties have established a Kin-Buc Trust Account (hereinafter the "Trust Account"). Each Settling Party has paid into the Trust Account an amount equal to its allocation obligation as set forth in a separate agreement among themselves, which is not part of this Consent Decree, plus an amount representing a proportional share of the allocations of Nonsettling parties. Within 45 days after the date of this Consent Decree, the Trustee of the Trust Account shall pay over to the United States the monies received and collected from Settling Parties in the amount of $4,980,398.00. The payment of the Trust Account to the United States shall be by certified or cashiers check made payable to "Hazardous Substances Superfund" and shall be mailed or otherwise delivered to:

Hazardous Substances Superfund

U.S. E.P.A., Superfund

P.O. Box 371003M

Pittsburgh, Pennsylvania 15251

Upon receipt by the United States of the payment from the Trust Account the United States' claims for Past Response Costs and Past Response Actions shall be extinguished.

4. *SATISFACTION.* The delivery of the payment by the Trust Fund to the United States as specified in this

Consent Decree, together with the other promises, agreements, covenants, conditions and mutual undertakings of this Consent Decree, extinguish the United States' claims for Past Response Costs and Past Response Actions and shall be full and complete satisfaction of the Settling Parties' liabilities under CERCLA, or under any other statute or common law, with respect to Past Response Costs and Past Response Actions and for any administrative costs and civil penalties which may have accrued prior to April 30, 1987, and for interest on such sums which may have accrued prior to September 22, 1987, with regard to the Kin-Buc Landfill.

5. *SETTLING PARTIES' RETENTION OF RIGHTS TO SEEK CONTRIBUTION OR INDEMNITY AND COVENANT NOT TO SUE EACH OTHER.* Each Settling Party shall retain all rights under statutory and common law to seek contribution or indemnity against any and all other persons, including any of the Owners/Operators or other Nonsettling Parties or any other person or entity, for any amount such Settling Party shall have paid pursuant to this Consent Decree except that no such rights are retained against any other Settling Party and such rights are hereby expressly waived, released and discharged with regard to other Settling Parties. For and in consideration of the mutual covenants and promises of the Settling parties made herein, each Settling Party hereby covenants not to sue or otherwise assert any claim against any other Settling party for reimbursement for any payment made pursuant to this Consent Decree.

6. *RESERVATION OF RELEASE.* (a) As a result of payments made for Past Response Costs and Past Response Actions pursuant to this Consent Decree, the

Settling parties are not released by the United States for any liability to the United States to which they may be subject for Future Response Actions or Future Response Costs, provided that such liability, if any, shall be limited by the provisions of this Consent Decree and shall not be imposed except pursuant to the terms hereof.

(b) As a result of payments made for Past Response Costs and Past Response Actions pursuant to this Consent Decree, the Settling Parties are not released by the United States for any liability for damages to, destruction of, or loss of natural resources in connection with the Kin-Buc Landfill and nothing in this Consent Decree shall be construed as a covenant not to sue Settling Parties for such natural resources damages or as the agreement of any Federal natural resource trustee to a covenant not to sue Settling Parties pursuant to Section 122(j)(2) of CERCLA.

7. *COVENANTS TO LIMIT ADMINISTRATIVE AND JUDICIAL ACTION AGAINST SETTLING PARTIES.* The provisions of Paragraph 6 or any other provision of this Consent Decree notwithstanding:

(a) In the event that the United States shall at any time deem it necessary to take any administrative or judicial civil action or actions to cause or compel any person or entity to implement Future Response Actions at or with regard to the Kin-Buc Landfill, the United States agrees that it shall not take such action against Settling Parties provided, however, that in the event the United States has made all reasonable efforts to cause or compel Nonsettling parties to implement Future Response

Actions at the Kin-Buc Landfill pursuant to relevant statutes and authorities, the United States may commence an administrative or judicial civil action against Settling Parties in order to cause or compel the Settling Parties to implement those Future Response Actions it has been unable, after having made all reasonable efforts, to cause or compel the Nonsettling Parties to undertake.

(b) In the event that the United States shall at any time deem it necessary to take any administrative or judicial civil action or actions to seek Future Response Costs or any other sum of money of whatever kind related to the Kin-Buc Landfill, the United States agrees that it shall not take such action against Settling Parties, provided, however, that in the event the United States has made all reasonable efforts to recover from the Nonsettling Parties the amount of Future Response Costs or such other sums at the Kin-Buc Landfill, pursuant to relevant statutes and authorities, the United States may commence an administrative or judicial civil action against the Settling Parties to recover the amount of those Future Response Costs or such other sums it has been unable, after having made all reasonable efforts, to recover from Nonsettling Parties.

(c) Actions taken by the United States for relief provided in Paragraph 7(a) shall not satisfy the covenant of the United States arising under Paragraph 7(b) and actions taken by the United States for relief provided for in Paragraph 7(b) shall not satisfy the covenant of the United States arising under Paragraph 7(a).

8. *EXCEPTIONS TO COVENANTS.* (a) Nothing contained in this Consent Decree shall be construed to defeat

the enforcement discretion of the United States by impairing its right to select which Nonsettling Parties to proceed against and the manner in which litigation will be conducted; provided, however, that said enforcement discretion shall not be construed to defeat the provisions of Paragraphs 7(a) and 7(b) regarding the making of all reasonable efforts to cause or compel the Nonsettling Parties to implement Future Response Actions or to recover Future Response Costs from the Nonsettling Parties.

(b) Provided the United States files an action for Future Response Actions or Future Response Costs against one or more of the Nonsettling parties which is not time-barred as of the date of filing of that action, the Settling Parties agree not to raise as a defense any statute of limitation in a subsequent action for the same relief brought by the United States against Settling Parties, provided such action is brought within 270 days of the termination of the action against Nonsettling parties.

(c) It is the intention of the parties to this Consent Decree that the Settling Parties not be joined in any action brought by the United States against Nonsettling Parties for Future Response Actions or Future Response Costs. In the event that in any such action brought against Nonsettling parties by the United States any Nonsettling Party seeks to have joined any Settling Party as a third party defendant, or otherwise, the United States shall not agree to the joinder of any Settling Party or the assertion of any direct claims by the United States against any Settling Party unless the United States is required to do so by order of Court. If requested by the Court to express its views with regard to the efforts of the Settling Parties to

avoid joinder, stay the filing of claims against them, obtain a severence of claims against them, or persuade the Court it should take no action to defeat the purposes of this Consent Decree and of the Covenant herein to limit suit, or otherwise, the United States shall express its continued support for the nonjoinder of Settling Parties on the grounds of effectuation of this Consent Decree and the Covenant to limit suit contained in Paragraph 7 of this Consent Decree. Provided that in the event that any Settling Party is, nevertheless, successfully joined in such an action by a Nonsettling Party and the United States asserts no claims of its own against such Settling Party, the Settling Party shall not, in any action or proceeding, whether taken under this Consent Decree or otherwise, assert as defenses against the United States as *res judicata* or collateral estoppel any matter of law or fact asserted by the parties to such third party action and adjudicated in the course of that third party action, nor shall such Settling Party assert as a defense that the United States' claims against the Settling Party should or could have been litigated in such earlier proceedings.

9. *RESERVATION OF SETTLING PARTIES' RIGHTS.* In the event that the United States asserts any unsatisfied claims for Future Response Costs or Future Response Actions against the Settling Parties, in any judicial or administrative proceeding, each and every Settling Party shall have preserved and may assert any and all defenses it shall have to such unsatisfied claims, except as provided in Paragraph 8 above.

10. *AGREEMENT NOT TO ASSERT CLAIMS.* The Settling Parties each agree not to assert any claims for relief, causes of action, or demands against the United

States or the Hazardous Substances Superfund with regard to any payment made pursuant to this Consent Decree.

11. *DENIAL OF LIABILITY.* Neither the performance of the agreement to make the payments provided for in Paragraphs 2 and 3 hereof, nor anything else contained in this Consent Decree shall be deemed an admission by any of the Settling Parties of any violation of law, or of jurisdiction over them under CERCLA or any other law, and this Consent Decree shall not be admissible as evidence in any proceeding at law or in equity, except to enforce or preserve the rights and obligations expressly set forth herein. Any payment made hereunder shall not be deemed a fine, penalty, or monetary sanction. The Settling Parties do not admit that payments made hereunder are not in settlement of damages; nor do they admit or contend that the payments made hereunder are in settlement of damages to, destruction of, or losses of natural resources in connection with the Kin-Buc Landfill. The Settling Parties, in entering into this Consent Decree, do not admit, accept, or acknowledge any liability or fault with respect to any matter arising out of or relating to the Kin-Buc Landfill. The Settling Parties do not admit, accept or acknowledge the procedural or substantive accuracy of any determinations made by the United States in connection with the Kin-Buc Landfill or of any contention of the United States expressed in the Whereas clauses of this Consent Decree. These express denials attach to any and all matters relating to or arising out of the Kin-Buc site.

12. *EXCLUSION.* Only Settling Parties and parties to the Agreement establishing the Trust Account are parties or may become parties to this Consent Decree.

13. *REPRESENTATION OF AUTHORITY.*Each signatory for a Settling Party represents that he or she has fully authority to enter into this Consent Decree on behalf of that party and to bind that party as provided herein.

14. *SUCCESSORS.* This Consent Decree shall apply to and be binding upon the parties, their successors, and assigns.

15. *CONTINUING JURISDICTION.* The Court specifically retains jurisdiction over both the subject matter of and the Parties to this action for the duration of this Consent Decree.

16. *SECTION HEADINGS.* The section headings set forth in this Consent Decree are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Decree.

This Consent Decree approved and entered on this 1st day of August, 1988. (AJL)

/s/ Alfred J. Lechner, Jr.
UNITED STATES DISTRICT JUDGE

For the United States:

/s/ Roger J. Marzulla
ROGER J. MARZULLA
Assistant Attorney General
Land and Natural Resources Division
Washington, D.C. 20530

SAMUEL A. ALITO, JR.
United States Attorney

JAMES WOODS,
Special Assistant
United States Attorney

/s/ Leonard H. Shen
LEONARD H. SHEN
Attorney
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

/s/ Illegible
For THOMAS L. ADAMS, JR.
Assistant Administrator for Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 88-2087

UNITED STATES OF AMERICA,	:	TRANSCRIPT OF PROCEEDINGS
v.	:	OPINION
ABSOLUTE FIRE PROTECTION CO., INC., et al.	:	(Filed Oct. 18, 1988)
Defendants.	:	Newark, New Jersey

BEFORE:

THE HONORABLE ALFRED J. LECHNER, JR.

Appearances:

None

[p. 2] THE COURT: This is an action instituted by the United States under section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. section 9607, for reimbursement of costs incurred by the United States in response to the release or threatened release of hazardous substances into the environment from the Kin-Buc Landfill Facility in Edison, New Jersey (the "landfill"). After lengthy negotiations, the Government and two hundred twenty six defendants in this case arrived at a settlement agreement. The Government now moves for an order entering the consent decree proposed by the parties. The matter is decided on the basis of the papers submitted pursuant to Fed. R. Civ. P. 78.

Background

The landfill at issue in this case is commonly known as the Kin-Buc Sanitary Landfill and is located at 383 Meadow Road, Edison, New Jersey. The landfill was formerly used for the disposal of solid and liquid domestic and commercial waste, and municipal, industrial and chemical wastes and sludges. Complaint, paragraph 5. The complaint alleges these wastes contained hazardous substances, pollutants and contaminants, as those terms are defined in section 101 of CERCLA, 42 U.S.C. section 9601. Complaint, paragraph 5.

[p. 3] According to the complaint, between 1973 and 1976 at least seventy million gallons of chemical wastes and unspecified quantities of solid materials were accepted for disposal at the landfill. The complaint alleges the disposal of these wastes at the landfill has resulted in a release of hazardous substances, pollutants and contaminants into the convironment [sic] since at least as early as 1976. *Id.*, paragraphs 7-8.

The United States has incurred costs through April 30, 1987, including interest through September 22, 1987, of at least $4,980,398 for response actions taken at the landfill. The United States continues to incur response costs, including costs of enforcement. *Id.*, paragraph 10.

The Government contends that certain persons and entities, including the defendants named in this action, by reason of their arrangement for disposal or treatment, or by reason of their arrangement for transport for disposal or treatment of the hazardous substances at the landfill, are responsible parties under section 107(a) of CERCLA, 42 U.S.C. section 9607(a), and are, together

with the owners and operators, jointly and severally responsible for response costs.

The Government was engaged for several years in negotiations with persons or entities which are [p. 4] assertedly responsible parties under CERCLA ("potentially responsible parties" or "PRPs"). A steering committee was established for those PRPs who would participate in the negotiations and in the ultimate settlement. During the course of the negotiations certain deadlines had to be met by PRPs in order to be able to participate. A final agreement was reached between the Government and two hundred twenty six PRPs (the "settling PRPs" or the "settling parties"). The proposed settlement then was considered and approved by the Environmental Protection Agency ("EPA") and the Justice Department.

On May 16, 1988, the United States filed the complaint in this action naming as defendants the two hundred twenty six PRPs who were part of the settlement agreement. The complaint alleges that the defendants are jointly and severally liable under section 107(a) of CERCLA, 42 U.S.C. section 9607(a), for the reimbursement costs of actions taken by the United States at the landfill in response to the released or threatened release of hazardous substances into the environment. *Id.*, paragraph 24.

The complaint seeks as relief: (1) a judgment against the defendants in favor of the United States for response costs incurred, plus interest, which costs through April 30, 1987 and interest through September 22, [p. 5] 1987, total at least $4,980,398; (2) a judgment in favor of the United States declaring the defendants liable for all

response costs incurred after April 30, 1987, plus interest; (3) an award to the United States of its costs including enforcement costs and attorney's fees; and (4) any other proper relief.

On the same day the complaint was filed, the proposed consent decree was lodged with the court. Federal regulations require publication of notice of the settlement in the Federal Register and a thirty day public comment period. In light of the posture of this case with respect to settlement, on June 15, 1988 I granted the Government's request for an order staying all discovery and litigation proceedings pending consideration of the proposed consent decree. All deadlines for filing responsive pleadings and motions were suspended.

The principal terms of the proposed consent decree are as follows. The decree specifies that performance of the agreement shall not be deemed as an admission of liability or fault. Consent Decree, paragraph 11. Under the agreement, the two hundred twenty six defendants in this case agree to pay $4,980,398, which represents the response costs incurred through April 30, 1987, plus interest through September 22, 1987 ("past response [p. 6] costs"). *Id.*, paragraph 2. The delivery of this payment will extinghish [sic] the United States' claims for past response costs against the settling parties. *Id.*, paragraph 4. Accordingly, the complaint's request for relief concerning these costs is to be dismissed with prejudice.

According to the consent decree, the settling parties are not released from any liability with respect to any actions or costs incurred by the United States after April 30, 1987 ("future response actions" or "future response

costs"). *Id.*, paragraph 6(a). The United States does covenant that if it is deemed necessary to institute any administrative or judicial civil aciton [sic] to compel the implementation of future response acitons, [sic] the United States shall not take such action against the settling parties until after having made all reasonable efforts to compel non-settling PRPs to implement future response actions. *Id.*, paragraph 7(a). The United States similarly covenants to not seek reimbursement of future response costs from the settling [p. 7] parties until after it has made all reasonable efforts to recover from non-settling PRPs. *Id.*, paragraph 7(b). In light of these covenants the complaint's claims which go beyond past response costs are to be dismissed without prejudice.

According to federal regulations, 28 C.F.R. section 50.7, notice of the consent decree was published in the Federal Register on June 3, 1988. *See* 53 Fed. Reg. 20379. The thirty day public comment period required by the regulations expired on July 5, 1988. Comments were received from two non-settling PRPs: St. Joe Paper Company, and Earthline Company and its affiliates SCA Services of Passaic, Inc., Wasteguid, Inc., and SCA Services, Inc. St. Joe Paper Company does not object to the terms of the settlement. St. Joe Paper Company seeks to be included as a settling party. Earthline Company objects that it is not included in the settlement and also makes certain objections with respect to the terms of the proposed consent decree.

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[1] The settling parties are also not released by the United States for any liability for damages to, destruction of, or loss of natural resources in connection with the landfill. *Id.*, paragraph 6(b).

Now that the public comment period has expired, the United States moves for the entry of the consent decree. For the reasons which follow, the motion is granted.

Discussion

CERCLA, 42 U.S.C. sections 9601 *et seq.*, authorizes government cleanup of hazardous waste sites using money [p. 8] provided by the Hazardous Substances Superfund ("Superfund"). However, it is generally acknowledged that the Superfund is limited and the costs of response activities nationwide greatly exceed the Superfund. Section 107(a) of CERCLA, 42 U.S.C. section 9607, therefore provides an avenue for the United States to recover response costs from responsible parties and thus replenish the Superfund in order to finance the cleanup of other sites. Through this action the United States seeks to recoup for the Superfund substantial sums that have been spent in connection with the Kin-Buc landfill from at least some of the numerous PRPs.

In an effort to save the time and costs involved in litigation, the Government and the defendants named in this action were involved in lengthy negotiations which resulted in the proposed consent decree. There is a strong policy favoring the voluntary settlement of civil actions because settlement saves both the parties and the courts the substantial resources required to proceed with litigation of the issues. *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982).

A. *Review of the Proposed Consent Decree*

The decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge. *SEC v. Randolph*, 736 F.2d 525, 529 (9th [p. 9] Cir. 1984). Nevertheless, a proposed consent decree ought to be approved unless it is unfair, inadequate or unreasonable. *Id.; Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 965 (3d Cir. 1983). Furthermore, "the courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment." *Randolph*, 736 F.2d at 529.

The proposed consent decree in this case appears to be fair, adequate and reasonable. The settling parties' agreement to pay the United States almost five million dollars implements the underlying cost recovery scheme of CERCLA by replenishing the Superfund promptly. In exchange the United States releases these parties from any liability concerning the response costs incurred prior to April 30, 1987. The settling parties remain liable for future response costs after the Government has made all reasonable efforts to seek recovery from non-settling parties. The settling parties also remain liable for any natural resource damage. This settlement agreed to by the numerous defendants is fair, adequate and safeguards the environment and the public interest.

[p. 10] B. *The Comments of the Non-Settling Parties*

1. *St. Joe Paper Company*

St. Joe Paper Company ("St. Joe") submitted a public comment concerning the proposed settlement of this case. St. Joe "objects to the settlement since it does not include them as a settling party." St. Joe Comment Letter at 1. St. Joe emphasizes that it believes the proposed settlement is fair, except for its exclusion, and asks this court to order the inclusion of St. Joe as a settling party. *Id.* at 4.

St. Joe concedes that it failed to comply with the deadline set by the Government for the submission of signature pages from those PRPs who desired to participate in the proposed settlement. St. Joe explains that a lack of proper communication between St. Joe and their New Jersey counsel resulted in a two month delay in forwarding the signature pages; St. Joe contends this was excusable neglect. *Id.* at 2, 4. The Government exercised its discretion to not accept St. Joe's belated offer to participate in the settlement because it would have further delayed the settlement process with respect to the two hundred twenty six PRPs who met the deadline for inclusion.

In considering St. Joe's objection and request, this court must pay deference to the judgment of the [p. 11] Government agency which has negotiated and submitted the proposed consent decree. *Randolph*, 736 F.2d at 529. The balancing of competing interests affected by a proposed consent decree "must be left, in the first instance, to the discretion of the Attorney General." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

Furthermore, in considering the proposed settlement, this court's role is limited. A court may either approve or disapprove a settlement, but may not rewrite the parties' agreement. *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 630 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Harris v. Pernsley*, 654 F. Supp. 1042, 1049 (E.D. Pa. 1987). Accordingly, in *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348 (6th Cir. 1986), the court of appeals held the district court abused its discretion when it conditioned approval of a proposed consent decree upon an amendment to allow a non-settling party to receive part of the settlement money. *Id.* at 351-52.

In light of the deference which the Government is due with respect to the settlement which it arrived at exercising its prosecutorial discretion, and in light of a court's limited role in reviewing a proposed settlement, it is inappropriate to order a modification [p. 12] of the decree to include St. Joe. Furthermore, even if a modification were proper, an order requiring the inclusion of St. Joe at this time would substantially prejudice the United States, while only providing a speculative benefit to St. Joe. As pointed out by the Government, St. Joe will only be prejudiced if the United States eventually brings suit against it for claims covered by this settlement, and if in attempting to settle such an action, St. Joe is faced with terms worse than those of this settlement. On the other hand, the inclusion of St. Joe at this time would result in a costly delay for the United States. A modification of the decree would require reapproval by the EPA and the Justice Department, as well as republication of the notice of settlement and a new thirty day public comment period. The delay would cost the United States several

tens of thousands of dollars in interest on the nearly several tens of thousands of dollars in interest on the nearly five million dollar settlement amount. Considering this court's appropriate scope of review of the consent decree and the equities involved in a modification to include a new party, St. Joe's request for inclusion is denied.

[p. 13] 2. *Earthline Company*

The second comment which was received was from another non-settling PRP, Earthline Company and its affiliates (collectively "Earthline"). In its comment letter, Earthline describes its involvement in the cleanup of the landfill and makes certain objections concerning the proposed consent decree.

First, Earthline states that it did not participate in settlement negotiations because the settling PRPs and the Government excluded Earthline from the negotiations. Earthline states that in 1985 it was refused an opportunity to review the drafts of the consent degree [sic]. Earthline asserts the "inescapable conclusion" is that the settling parties deliberately negotiated the decree behind Earthline's back. Earthline Comment Letter at 4.

The intentions of the settling parties with respect to non-settling parties are not relevant to this court's review of the proposed consent decree in this case. Moreover, the Government may properly exercise its discretion in selecting among PRPs when settling claims. Nevertheless, the Government has submitted affidavits which indicate

that Earthline was invited to participate in the negotiations but it declined to do so. No counter-affidavits were submitted.

[p. 14] According to the Government, in November, 1984, representatives of Earthline indicated to the counsel of the settling parties' Steering Committee that Earthline was not interested in joining the settlement discussions. Affidavit of James W. Moorman ("Moorman Aff."), paragraphs 7-8. In May, 1985, the EPA urged Earthline once more to participate in the negotiations. Affidavit of Douglas R. Blazey ("Blazey Aff."), paragraph 17. Subsequently, in July, 1985 Earthline asked the Steering Committee for a copy of the draft consent decree which was being discussed. Mooreman Aff., paragraph 12. In light of Earthline's prior refusal to participate, Earthline was asked to write a letter to the Steering Committee clarifying whether it would participate in the settlement negotiations. *Id.* The Government points out it would have been inappropriate to disclose confidential settlement documents with parties who had not declared an interest in negotiating and who were potential litigants. Blazey Aff., paragraph 18. In the past three years, Earthline did not communicate, in writing or otherwise, with the EPA or the settling parties' Steering Committee to request participation. *Id.*, paragraph 19; Moorman Aff., paragraphs 13-14.

In light of the Government's submissions, it appears that Earthline's failure to participate in the [p. 15] settlement negotiations was due to its own failure to properly declare its interest. In any event, as mentioned, the balancing of competing interests affected by a proposed consent decree "must be left, in the first instance, to the

discretion of the Attorney General." *Bechtel Corp.*, 648 F.2d at 666.

Earthline's second complaint concerning the proposed decree is that it unfairly penalizes Earthline for complying with an EPA cleanup order while it rewards the settling PRP's for failing to come forward with cleanup proposals. Earthline asserts that paragraph seven of the consent decree commits the Government to direct all future enforcement efforts at non-settling PRPs such as Earthline and thereby "'shoots the volunteers." Earthline Comment Letter at 4.

In response, the Government points out that Earthline did not volunteer to perform certain response actions with respect to the landfill. Earthline was compelled by an EPA Unilateral Administrative Order, originally issued in 1984, to complete all necessary cleanup actions at the landfill. The proposed consent decree in this case does not penalize Earthline in that it does not change Earthline's obligations under the 1984 EPA order.

[p. 16] In addition, contrary to Earthline's assertions, the consent decree does not "reward" the settling defendants for failing to undertake cleanup actions in the past. Rather, the consent decree requires the settling parties to pay nearly five million dollars for past response costs incurred by the United States, and further maintains the settling parties' liability for future response costs which cannot be recovered from the non-settling PRPs.

Earthline's last objection pertains to the consent decree provision that if the United States sues non-settling PRP's for additional relief and any non-settling PRP seeks to join one of the settling PRPs as a third-party

defendant, "the United States shall not agree to the joinder of any Settling Party or the assertion of any direct claims by the United States against any Settling Party unless the United States is required to do so by order of Court." Consent Decree, paragraph 8(c). Earthline asserts this provision is inconsistent with section 113(f)(1) of CERCLA, 42 U.S.C. section 9613(f)(1), which provides that any person may seek contribution from any other person during or following a civil action instituted under sections 106 or 107(a), 42 U.S.C. sections 9606, 9607(a).

[p. 17] As pointed out by the Government, the decree only requires the Government to oppose joinder when it is sought in the context of a direct enforcement action brought by the Government against a non-settling PRP. Thus, as long as Earthline complies with its legal obligations and no action is brought against it by the United States, paragraph 8(c) will not apply and Earthline may seek contributions from the settling parties without opposition from the Government.

Furthermore, even if paragraph 8(c) is triggered in the context of an enforcement action brought by the United States, the consent decree's provision only requires the United States to take a legal position in opposition to the joinder of a settling party in order to provide some repose to the settling parties in return for their settlement payment. The decree's provision, however, is not a legal bar to a third party contribution action as a court could order the joinder notwithstanding the Government's position.

Earthline's objections concerning the decree appear to be based on misperceptions of the circumstances surrounding the cleanup of the landfill and the effect's provisions. Earthline has not presented any compelling reason why the proposed consent decree should not be viewed as fair, adequate and reasonable.

[p. 18] *Conclusion*

The proposed consent decree in this case appears to be fair, adequate and reasonable. Furthermore, the comments submitted by St. Joe and Earthline do not present any sound basis to reject this settlement reached after lengthy negotiations and under which the two hundred twenty six defendants in this case agree to settle for almost five million dollars. The Government's motion for an order entering the decree is granted.